IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 633 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VIJAYABEN PARSHOTTAM KOTAK

Versus

PARSHOTTAM KOTAK

Appearance:

1. Civil Revision Application No. 633 of 2002

MR NK MAJMUDAR for Petitioner No. 1

MR BD KARIA for Respondent No. 1

CORAM : MR.JUSTICE K.A.PUJ

Date of decision: 09/10/2002

CAV JUDGEMENT

1. The present revision application is filed against the order passed by the ld. Extra Assistant Judge, Jamnagar on 22.4.2002 in Civil Misc. Application No. 62 of 1997 allowing the said application and directing the

petitioner-wife to hand over the custody of two minor sons namely Kishor alias Kanaiyalal and Himanshu to the respondent-husband within one month from the date of the said order. It is further directed that the respondent-husband should call upon the petitioner-wife to come back to Porbandar and invite her to live together with him and two minor sons. If the petitioner-wife refused to stay with the respondent-husband at Porbandar than petitioner-wife has liberty to meet her two minor sons on each occasion at the house of the respondent-husband at Porbandar. The respondent-husband was further directed to to pay the regular maintenance tothe petitioner-wife as per the order of the court passed in Criminal Misc. Application filed under sec. 125 of Cr.P.C.

2. The brief facts giving rise to the present revision application are stated as under:

3. The petitioner in this petition is the wife of the respondent and the marriage of the petitioner with the respondent was solemnised on 28.5.1989. It was the second marriage of the petitioner as well as of the respondent. That out of the said wedlock, the petitioner gave birth to two sons i.e. on 20.7.1990, the petitioner gave bith to son Kanaiyalal while on 14.3.1992 the petitioner gave birth toson Himanshu. That the present respondent was having three daughters from his earlier marriage and two daughters were already married. The third daughter namely Priti is studying at Porbandar.

4. The respondent has filed an application being Civil Misc. Application NO. 62 of 1997 under the provisions of section 7 of Hindu Minority and Guardianship act, 1956 in the Court of Ld. District Judge, Jamnagar. The said application was filed on 19.7.1997 praying for diretion for custody of twominor sons i.e. Kanaiyalal and Himanshu from the petitioner-wife. It was contedned in the said application that two minor sons who are residing with the present petitioner, looking to their interest and welfare, it would be justiciable if orders are passed for giving custody of the said children in favour of the respondent- husband-father. It was further contended in the said application that without any just and reasonable cause, the petitioner-wife left the matrimonial home and since the petitioner does not have sufficient means to maintain herself and the children, she preferred application seeking maintenance under section 125 of the Code of Criminal Procedure.

5. Pursuant to the said application, the petitioner-wife appeared and resisted the said application by filing her written statement/reply at ex. 24. The petitioner contended that the said application was misconceived and looking to the welfare of the children, it was in the fitness of the things that the court should not pass any order with regard to the handingover the custody of minor children to the respondent-husband. It is further contended that during the pendency of the said application before the ld. Extra Assistant Judge, Jamnagar, the petitioner-wife was directed to keep the children present before the court so as to know the wishes of the minor children. The children had remained present and had shown their wish to stay with their mother. After considering the application as well as written statment of the petitioner and also after going through the evidence adduced by the parties and despite the children having shown there willingness to stay with the mother, the ld. Extra Assistant Judge has passed an order dated 22.4.2002 directing the petitioner-wife to hand over the custody of minor children to respondent-husband. It is this order which is under challenge in this civil revision application.

6. Mr. NK Majmudar learned advocate appearing for the petitioner submits that the ld. judge has graviously erred in allowing the application of the respondent. Despite the fact that the children have shown their willingness to stay with mother, the order was passed directing the petitioner to hand over the custody of the minor children to the respondent. He has further submitted that though the impugned order was passed after having considered the welfare of the minor children, in reality, the welfare of the children was not considered at all as the mother can take care of the children in far better way as compared to the father. He has further submitted that merely because the mother is dependent on the husband for her maintenance as well as that of the children, it should not be considered as a ground for handing over the custody of the minor children to the father. Mr. Majmudar has further submited that the ld. judge has not properly appreicated the provisions of section 6 of the Hindu Minority and Guardianship Act, 1956 as financial affluence cannot be the sole ground for allowing application for custody of minor children.

7. In support of his contention, Mr. Majmudar has relied on the decision of Karnataka High Court in the case of C.S. Reddy vs. Smt. Yamuna Reddy, reported in AIR 1975 Karnataka 134, wherein it is held that the

dominant factor for the consideration of the court is the welfare of the child. But the welfare of the child is not to be measured by money or by physical comfort only. The word "welfare" must be taken in its widest sense. The moral or religious welfare of the child must be considered as well as its physical well being. It is further held that the principal considerations laid down in Section 17 of the Guardians and Wards Act to secure the welfare of the minor are:(a) age, (b) sex, (c) religion, (d) character and capacity of the proposed guardian (e) his nearness of kin to the minor, (f) the wishes, if any, of the deceased parent, (g) any existing or previous relations of the proposed guardian with the minor or his property and (h) if the minor is old enough to form an intelligent preference, that preferance. The application of these tests casts an arduous duty on the Court, but as has been repeatedly pointed out amongst the many and multifarious duties that a Judge in Chambers performs by far the most onerous duties are those cast upon him by the Guardians and Wards Act. After considering the various decisions and the facts of that case, the court has come to the conclusion that human nature is much the same al the world over and the mother is a suitable persn to take charge of the child, it is quite impossible to find an adequate substitute for her for the custody of a child of tender age.

8. Mr. Majmudar has further relied on the decision of the Supreme Court in the case of Smt. Mohini vs. Virender Kumar, reported in AIR 1977 SC 1359, wherein also the Supreme COurt has taken the view that the welfare of the minor must be paramount and the mother was declared entitled to guardianship and custody of the child aged 11 years old.

9. Lastly, Mr. Majmudar has relied on the decision of the Madhya Pradesh High Court in the case of Sardar Bhupendra Singh vs. Smt. Jasbir Kour, reported in AIR 2000 Madhya Pradesh 330, wherein it is held that the welfare of the minor is a supreme consideration in such cases and while ordering the custody the principle enunciated under Sc. 6 and 13 of the Hindu Marriage and Guardianship Act which are pre-existing right of the minor and found statutory expressions are tobe given effect to while considering the factum of custody of minor under S. 26 of the Hindu Marriage Act. It is further held that a bare reading of S. 26 of the Hindu Marriage Act envisages that in the matrimonial dispute welfare of the child should be of paramount consideration as because of quarrelling mother and father who are at logger-heads, their interest cannot be allowed to suffer

in the matrimonial proceedings of divorce/any other proceedings under the Hindu Marriage Act.

10. On the basis of the aforesaid decision and on the basis of the statutory provisions contained in the Hindu Minority and Guardianship Act as well as Hindu Marriage Act, Mr. Majmudar has strongly urged that the order passed by the ld. judge requires to be quashed and set aside and the custody of the minor children should be ordered to be retained with the petitioner-mother.

11. As against the aforesaid submissions of Mr.Majmudar representing the case of the petitioner-wife, Mr.BD Karia learned advocate appearing for the respondent-husband strongly contended that the order passed by the ld. judge is just and proper and all the aspects of the matter were duly taken into consideration and since there is no infirmity in the order, this court, while exercising its revisional jurisdiction under sec. 115 of CPC should not interfere in the said order. He has further submitted that the ld. trial judge has taken into consideration as many as 11 factors and after considering all these relevant factors, the order regarding handing over the custody of the minor children from petitioner-wife to respondent-husband was passed. As far as the educationof the minor children is concerned, it is observed that both the minor sons are more than 5 years old and they are likely to enter into primary education and, thereafter secondary education. Both the minors are residing with mother at Bhanvad and take education in Takshashilla Primary School at Bhanvad, but looking to the fact that the mother is residing at Bhanvad, a small town and father is residing at Porbandar, a big city and district place, therefore, more facility are available at Porbandar rather than Bhanvad, therefore better welfare of the minor can be secured more effectively at Porbandar rather than at Bhanvad. With regard to the age and sex of minor children, it is observed by the ld. judge that both the minor children are male and, their age on the date of the order is about more than 10 years and that the necessities are also increasing day to day and father can fulfill necessities in far better manner rather than the same can be fulfilled by the mother. As far as the love and affection as well as character of the parties are concerned, there is nothing adverse to any one. Both are giving equal love and affection to the children and there is no allegation about the character of both the parties. So far as the economic condition is concerned, it is observed by the ld. trial judge that the father is a Government servant, well educated and financial position

of the father is also very sound. The mother has no source of income and she is exclusively depending upon the maintenance which is to be received from the husband. With regard to the property, the ld. judge has observed that the father is having the property in his own name and the minor children would be benefitted by virtue of having their stay with the father. The mother does not have any property in her name. It is further observed that the respondent's daughter namely Priti is studying in Porbandar and she can also take care of minor children. After considering all these factors, ld. judge has passed the order directing the petitioner-wife to hand over the custody of minor children to the respondent-husband. As far as authorities relied upon by Mr. Majmudar, it is submitted by Mr. Karia that the said authorities are not relevant so far as the facts found by the court in this case and there is no straight jacket formulla under which it can be held that the custody of the minor should always remains with the mother. In this view of the matter, he has strongly supported the order passed by the ld. judge and requested this Court not to interfere with the same.

12. I have heard both the learned advocates appearing for the respective parties and I have also gone through the order passed by the ld. judge as well as the authorities relied upon by the learned advocates. Before dealing with the contentions urged on behalf of the respective parties, it is necessary to observe with regard to the conduct of the petitioner-wife in the present proceedings. At the time when this matter was first listed for hearing on 18.6.2002, this Court has passed an order recording the statement of Mr.BD Karia learned advocate appearing for the respondent-husband that the respondent is prepared to take the petitioner along with two minor children and all of them can stay together at Porbandar. This court has further recorded the statement of Mr. BD Karia that according to the instructions received from the local advocate, the petitioner is also prepared to stay with respondent-husband. The respondent was present on 18.6.2002, however, the petitioner was not present. This Court has, therefore, passed an order directing the parties to remain present on 1.7.2002. The matter was again posted for hearing on 12.7.2002 and the petitioner's advocate agrees to keep the petitioner present on 30.7.2002. On 16.8.2002 this court was at pain to observe that the otherside has remained present all through-out and it was mentioned on behalf of the petitioner that the petitioner has been hospitalised and hence she was not in a position to come. The court has

further observed that this shows that adequate interest is not being taken onbehalf of the petitioner at the appropriate stage. Thereafter, the matter was placed for hearing on different dates and on none of the occassions, the petitioner remained present despite the fact that the petitioner's advocate was repeatedly directed by the court to keep the petitioner present in the court. On almost all occassions the respondent-husband had remained present in the court and he has made the statement that he is prepared to acept the petitioner along with two minor children to stay at Porbandar. Mr. Majmudar has also fairly submitted that he has made all his efforts to ask the petitioner to remain preent in the court, but either under one or other pretext the petitioner did not remain present on any of the occasions. This shows that the petitioner is not interested to amicably settle the matter despite all efforts having been made by the learned advocates as well as despite the adequate opportunities and diretions having been given by the court.

13. Coming to the merits of the matter, there is no dispute and there may not be dispute with regard to the proposition that the minors' welfare is the supreme paramount consideration while deciding the issue regarding their custody. It is, however, dependent upon the facts and circumstances of each case to ascertain as to how the minors' welfare can better be secured. The courts have laid down certain relevant consideration for the purpose of deciding these issues. These considerations are education, financial stability, age of the children, natural love and affection of the parties, the moral character as well as social status andthe wish of the minor if they are capable enough of taking proper decision. The court is supposed to evaluate all these factors and after considering the welfare of the minor, the court may come to the conclusion as to whether the minor's welfare will be secured either by staying with father or staying with mother. In the present case, the ld. judge has done the same thing and by evaluating each of these factors has come to the conclusion that the minor's welfare will more effectively be secured by staying with the father. This decision cannot be said to be unjust or improper simply because another view can also be taken in the given set of circumstances. This court's power under sec. 115 of CPC are very limited and the order of the court below can be varied or interfered with only when the said order is passed without having any jurisdiction or the court has acted in excess of jurisdiction or there may be any jurisdictional error in passing the said order which results into material

irregularity or illegality. None of these facts was found in the present case.

14. The authorites relied upon by Mr. NK Majmudar are also not relevant looking to the facts of the present case. The case of Smt. Mohini vs. Virender Kumar (supra) is decided more or less on concensus basis. As per the understanding arrived at between the parties, the Supreme Court has decided the said matter and hence the Supreme Court has rightly observed that the frayed feelings between the parties may be softerned and their attitude towards their son may some day bring them together into a better relationship. It is further observed in that case that the counsel for the parties have helped the court in producing a happy solution to this unhappy episode.

15. So far as the Karnataka decision is concerned, the Court has observed that the girl will be soon attaining age and in that difficult period it should be the mother who should be in custody of the girl and not the father. With regard to the father, it is observed that he was living with an old mother and he has to attend to his business the whole day and he has to go out of Banglore more often. In such surroundings, there was every likelihood of the girl runnng serious risks. It was further observed that the minors have been looked after by the mother and they have lost touch of the father. In the present case, this situation is not there. Both the minor children are boys. The father is a Government servant and during the course of hearing certain photographs were shown to the court wherein the children are actually visiting to the father's place. So, there is no question of loosing any touch of father. The respondent's daughter is also very much there to take care of her younger brothers. In the case of Sardar Bhupendra Singh vs. Smt. Jasbirkour (supra) the Court has found as a matter of fact that the father of children was having no time for children and it was not unfounded. The said children were not in immediate charge of father but taking education at different places. On this fact, the court has come to the conclusion that there is no reason why they would not like to stay with their sister and mother and the custody of both the sons should not be handed over to mother. In the present case, the father is staying at Porbandar and the children were also to be stayed at Porbandar along with the father. There is no question of sending them to a different place for further education. On the contrary, if the children were to be allowed to stay with their mother at the small village Bhanvad, they would be required to be sent other places

for higher education and in that case, they would not be in the immediate charge of the mother. In this view of the matter, the authorities relied on by Mr. NK Majmudar are not applicable to the facts of the present case.

16. Considering all the aspects of the matter and considering the well reasoned order passed by the ld. judge and futher considering the limited scope of revision under sec. 115 of CPC, I am of the view that the order passed by the ld. judge does not call for any interference and hence this civil revision application is rejected. Notice discharged with no order as to costs.

(K.A. PUJ, J.)
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